UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC) and UNITED STEEL, PAPER AND FORESTRY RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	08-CA-117890, *et al*.

RESPONDENT HOSPITALS' REPLY TO GENERAL COUNSEL'S OPPOSITION TO CHS, INC. AND CHSPSC, LLC'S REVISED MOTION TO ADOPT MODIFIED CONSENT ORDER

As Respondents in the above-captioned cases, DHSC, LLC d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Fallbrook Hospital Corporation formerly d/b/a Fallbrook Hospital, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center and Watsonville Hospital Corporation d/b/a Watsonville Community Hospital (hereafter, collectively, the "Hospitals") hereby reply, by and

through the Undersigned Counsel, to the Opposition (hereafter, the "Opposition") filed by the General Counsel to the Revised Motion to Adopt Modified Consent Order (hereafter, the "Motion") filed by CHS, Inc. and CHSPSC, LLC.

In the Opposition, the General Counsel urges Your Honor to deny the Motion because the Order proposed by CHS, Inc. and CHSPSC, LLC does not provide for a corporate-wide cease and desist remedy. In large part, the General Counsel argues that such a remedy is appropriate because, supposedly, the Hospitals are "recidivist actors" with "an extensive history of pervasive unlawful conduct, and "flagrant disregard for Board decisions and court orders." See Opposition, page 11; see also page 14 ("General Counsel submits that a corporate-wide order is appropriate in the context of the recidivist history of the Respondent Hospitals"). The Hospitals respectfully request an opportunity to provide Your Honor with the actual history of unfair labor practices, as opposed to the hyperbolic version manufactured by the General Counsel.

As a preliminary matter, however, the Hospitals should address the Orders that have been issued by U.S. District Courts under Section 10(j) of the National Labor Relations Act, as amended (hereafter, the "Act"), as they

are used by the General Counsel for a delusory purpose.[1] In every one of these cases, the General Counsel stressed to the Court that the role of the Court was **not** to decide whether any unfair labor practice had, in fact, taken place. Instead, the role of the Court was only to decide whether there was "reasonable cause" for the General Counsel to believe that the given facility had violated the Act, and if so, whether the interim remedy available under Section 10(j) of the Act was necessary in order to preserve the ability of the Board to remedy any unfair labor practice later found by the Board to have actually taken place at the facility. As part of the ongoing effort to frustrate the ability of CHS, Inc. and CHSPSC, LLC to resolve the disputes before Your Honor, however, the General Counsel has presented the 10(j) Orders as evidence of the Hospitals' repeated violations of the Act, or in a word, their supposed "recidivism." The fact that the General Counsel previously urged

[1] In the case of Affinity, a 10(j) Order was entered by the U.S. District Court for the Northern District of Ohio on January 24, 2014 and expired with the issuance of the Board's related Decision and Order on April 30, 2015. Case No. 5:13-CV-01538 (JRA). In the case of Barstow, a 10(j) Order was entered by the U.S. District Court for the Central District of California on June 24, 2013 and expired with the issuance of the Board's related Decision and Order on August 29, 2014. Case No. 5:13-CV-00933 (CAS). A new 10(j) Order was entered by the same Court on August 29, 2016 and presently remains in place. Case No. 5:16-CV-01600 (CAS). In the case of Fallbrook, a 10(j) Order was entered by the U.S. District Court for the Southern District of California on June 7, 2013 and expired with the issuance of the Board's related Decision and Order on April 14, 2014. Case No. 3:13-CV-01159 (GPC).

the Courts to refrain from any review of the merits of the alleged unfair labor practices, but now presents the 10(j) Orders as effectively the final word on these disputes, exposes an argument that is far more contrived than convincing.

The Hospitals should also note that, even though the 10(j) Orders cover a collective period of time of roughly three and a half years, and in spite of the notion that the Hospitals have engaged in seemingly perpetual violations of the Act, the General Counsel has not once returned to any of these Courts and alleged any failure or refusal of the given facility to comply with the Order. In the end, therefore, the take away from the 10(j) proceedings is that the Hospitals respect and comply with the law.

The Hospitals now turn to the Decisions and Orders previously issued by the Board, which do not provide any basis to characterize any of the Hospitals as a "recidivist."

1.) Affinity Medical Center

Affinity is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. In DHSC, LLC d/b/a Affinity Medical Center, 362 NLRB No. 78 (April 30, 2015), the Board determined that Affinity violated Section 8(a)(1) by virtue of statements made and actions taken by one of the Hospital's (former)

managers, and the exclusion of one of the Union's organizers from the Hospital's facility. The Board also determined that Affinity's termination of one employee, and a related report to the Board of Nursing in the State of Ohio, violated Section 8(a)(3) of the Act. Lastly, the Board found that Affinity's refusal to recognize and bargain with the Union, which was undertaken by the facility in order to challenge the Certification of Representative, violated Section 8(a)(5) of the Act. 362 NLRB No. 78, *19. In response to the Board's Decision and Order, on November 17, 2015, Affinity filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit, which remains pending before the Court. See D.C. Cir. Case No. 15-1426.[2]

2.) Barstow Community Hospital

Like Affinity, Barstow is the subject of one, and only one, Decision and Order in which the Board determined that the Hospital violated the Act. Unlike Affinity, Barstow's violations were confined to Section 8(a)(5) of the Act. In Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, 361 NLRB No. 34 (August 29, 2014), the Board determined that Barstow

[2] The proceedings before the Court of Appeals have been placed into abeyance, given the fact that the outcome of Affinity's challenge to the Certification of Representative will likely be determined by the outcome of Barstow's challenge to the Certification of Representative that covers its RNs, and is before the same Court. See footnote 3, *infra*.

violated Section 8(a)(5) of the Act by the refusal to make any proposals before the presentation of the Union's proposals, the declaration of an impasse because of the Union's refusal to cease distribution of "Assignment Despite Objection" forms, and changes to a policy related to RN education. 361 NLRB No. 34, *1-2. In response to the Board's Decision and Order, Barstow filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit.[3]

3.) Bluefield Regional Medical Center

Here also, Bluefield is the subject of one, and only one, Decision and Order, which arises from the Hospital's challenge to the Certification of Representative that was issued in the Union's favor. In Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, 361 NLRB No. 154 (December 16, 2014), the Board rejected Bluefield's challenge to the Certification of Representative and the other grounds on which the Hospital

[3] On April 29, 2016, the Court of Appeals vacated the Board's Decision and Order due to the Board's failure to review Barstow's challenge to the Certification of Representative on the merits. Hospital of Barstow, Inc. d/b/a Barstow Community Hospital v. NLRB, 820 F.3d 440. On July 15, 2016, the Board issued a Supplemental Decision and Order in which the panel validated the Certification of Representative and re-adopted the findings and conclusions set forth by the Decision and Order vacated by the Court of Appeals. 364 NLRB No. 52. The Supplemental Decision and Order is currently before the Court of Appeals by virtue of a new Petition for Review filed by Barstow. D.C. Cir. Case No. 16-1343.

had relied to decline to recognize and bargain with the Union.[4] Bluefield did not pursue any federal court review of the Board's rulings. Instead, the Hospital recognized the Union and offered dates for the commencement of the parties' negotiations. In the meantime, the Board pursued an Application for Enforcement, which was later granted by the U.S. Court of Appeals for the Fourth Circuit. See NLRB v. Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, *et al*., 821 F.3d 534 (2016).

4.) Fallbrook Hospital

Once more, like the other Hospitals reviewed above, Fallbrook is the subject of one, and only one, Decision and Order issued by the Board. In Fallbrook Hospital Corporation d/b/a Fallbrook Hospital, 360 NLRB No. 73 (April 14, 2014), which was a case originally before Your Honor, the Board determined that Fallbrook had engaged in bad faith bargaining in connection with the parties' negotiations toward a collective bargaining agreement. The Board also determined that Fallbrook failed to bargain over, and failed to provide information related to, the termination of two employees. 360 NLRB No. 73, *15. In response to the Decision and Order, Fallbrook filed a

[4] Bluefield Hospital Company, LLC was a consolidated proceeding that also encompassed the challenges that Greenbrier Valley Medical Center had pursued in connection with the Certification of Representative issued in the Union's favor.

Petition for Review with the Court of Appeals (see D.C. Cir. Case No. 14-1056), but only as to the remedy awarded by the Board.

5.) Greenbrier Valley Medical Center

As noted above (see fn. 4), Bluefield Hospital Company, LLC, 361 NLRB No. 154, also encompassed Greenbrier's challenge to the Certification of Representative issued in the Union's favor as to the RNs employed by Greenbrier. The Board rejected Greenbrier's challenge and other arguments. Like Bluefield, in response to the Decision and Order, Greenbrier recognized the Union and offered dates for the commencement of the parties' negotiations. The Application for Enforcement referenced above, and the Decision later issued by the U.S. Court of Appeals for the Fourth Circuit, also covered Greenbrier.

Greenbrier was the subject of one other Decision and Order issued by the Board. In Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, 360 NLRB No. 127 (May 29, 2014), the Board determined that Greenbrier violated Section 8(a)(3) of the Act by virtue of a performance improvement plan, written warning and schedule change related to a particular employee, namely Mr. James Blankenship. 360 NLRB No. 127, * 10. The Hospital did not pursue any federal court challenge, but rather, fully complied with the Board's Decision and Order. As confirmed by the

Board's e-docket, the case was closed nearly two years ago on account of the Hospital's compliance. See Case No. 10-CA-094646.

6.) Watsonville Community Hospital

Zero. That is the number of occasions on which the Board has found Watsonville, a facility with long-standing collective bargaining relationships with four (**4**) different labor organizations, in violation of the Act.[5]

* * *

In summary, any argument by the General Counsel that a sweeping corporate-wide remedy is necessary because of the Hospitals' avowed recidivism is, simply, a house of cards. Indeed, as noted just above, the argument is patently frivolous as to Watsonville. In the case of Bluefield, the argument borders upon the frivolous. As viewed through the fog of the General Counsel's advocacy, the action perceived by the General Counsel to violate the Act so egregiously was, in reality, merely the exercise of the Hospital's fundamental right to challenge the outcome of the election, which, as Your Honor surely knows, can only be pursued by a "technical" refusal to bargain. When the Board rejected the challenge, Bluefield

[5] Incidentally, though to a lesser degree, the same point should be made on behalf of Barstow in connection with the facility's collective bargaining relationship with SEIU United Healthcare Workers – West, which goes back to 2012. The Board has never found any unfair labor practices to have taken place as part of the relationship between Barstow and the SEIU.

recognized the Union and negotiations got underway. When, as part of the same case, the Board rejected the challenges pursued by Greenbrier, the Hospital responded in the very same way. Likewise, in response to the Board's findings related to Mr. Blankenship, the Hospital duly performed each and every remedy ordered by the Board. So much for the General Counsel's claim that the Hospitals have an "**extensive history**" of "**flagrant disregard for Board decisions**." See Opposition, page 11 (emphasis added).

In the case of Affinity, Barstow and Fallbrook, the history of unfair labor practices is undeniably shallow. In the particular case of Fallbrook, given the closure of the facility nearly two years ago, the General Counsel lacks a basis to put together any case of recidivism. Presumably, even the extremity of the General Counsel's position does not go so far as to imagine the ability of Fallbrook to violate the Act from the grave. In terms of Affinity and Barstow, as noted above, the Hospitals are the subject of one, and only one, Decision and Order issued by the Board, neither of which have been enforced by a Court of Appeals. Thus, aside from the fact that the Board does not follow a "one strike and you're out" approach toward recidivism, the General Counsel should not be allowed to define recidivism in a way that calls for predictions of the future (*i.e.*, favorable outcomes

before the Court of Appeals) on top of shamelessly revised versions of history.

Dated: Glastonbury, CT
November 2, 2016

Respectfully submitted,

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP
Attorneys for DHSC, LLC d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Fallbrook Hospital Corporation formerly d/b/a Fallbrook Hospital, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, and Watsonville Hospital Corporation d/b/a Watsonville Community Hospital
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bryancarmody@bellsouth.net

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers, *et al*. and CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA / NNOC)	08-CA-117890, *et al*.

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on November 2, 2016, the document above was served upon the following *via* email:

Aaron Sukert, Esq.
Stephen Pincus, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 8
1695 AJC Federal Office Building
1240 East Ninth Street
Cleveland, OH 44199
Aaron.Sukert@nlrb.gov
Stephen.Pincus@nlrb.gov

Ashley Banks
Counsel for the General Counsel
National Labor Relations Board, Sub-Region 11
4035 University Parkway, Suite 200

Winston-Salem, NC 27106
Ashley.Banks@nlrb.gov

Timothy Mearns
Counsel for the General Counsel
National Labor Relations Board, Sub-Region 11
4035 University Parkway, Suite 200
Winston-Salem, NC 27106
Timothy.Mearns@nlrb.gov

Carlos Gonzalez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 31
11150 West Olympic Blvd., Suite 700
Los Angeles, CA 90064-1825
Carlos.Gonzalez@nlrb.gov

Noah Garber
Counsel for the General Counsel
National Labor Relations Board, Region 32
1301 Clay Street
Oakland, CA 94612
Noah.Garber@nlrb.gov

Leonard Sachs, Esq.
Counsel for Respondent Community Health Systems, Inc.
Howard & Howard
211 Fulton Street, Suite 600
Peoria, IL 61602
LSachs@HowardandHoward.com

Tracy Litzinger, Esq.
Counsel for Respondent Community Health Systems, Inc.
Howard & Howard
211 Fulton Street, Suite 600
Peoria, IL 61602
TLitzinger@HowardandHoward.com

Robert Hudson, Esq.
Counsel for Respondent CHSPSC, LLC

Frost Brown Nixon
7310 Turfway Road, Suite 210
Florence, KY 41042
rhudson@fbtlaw.com

Jane Lawhon, Esq.
Counsel for Charging Party California Nurses Association
155 Grand Avenue
Oakland, CA 94612
JLawhon@CalNurses.Org

Nicole Daro, Esq.
Counsel for Charging Party California Nurses Association
155 Grand Avenue
Oakland, CA 94612
NDaro@CalNurses.Org

Micah Berul, Esq.
Counsel for Charging Party California Nurses Association
155 Grand Avenue
Oakland, CA 94612
NDaro@CalNurses.Org

Bruce Harland, Esq.
Weinberg Roger & Rosenfeld
800 Wilshire Boulevard
Suite 1320
Los Angeles, CA 90017
bharland@unioncounsel.net

Dated: Glastonbury, CT
November 2, 2016

Respectfully submitted,

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP

Attorneys for DHSC, LLC d/b/a Affinity Medical Center, Hospital of Barstow, Inc. d/b/a Barstow Community Hospital, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center, Fallbrook Hospital Corporation formerly d/b/a Fallbrook Hospital, Greenbrier VMC, LLC d/b/a Greenbrier Valley Medical Center, and Watsonville Hospital Corporation d/b/a Watsonville Community Hospital
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bryancarmody@bellsouth.net